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No. 81-2169

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

GILBERT A. HARING, HENRY W. ALLEN,
J.R. BADEY, ALVIN BEUCHERT, THOMAS TRUMBLE,
AND STANLEY GARBER,
Petitioners,

v.

JOHN FRANKLIN PROSISE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is respondent precluded by the conventional doctrine of collateral estoppel from litigating in an action under 42 U.S.C. § 1983 a fourth amendment claim which was not raised or litigated in his state criminal prosecution?

II. Does this Court's decision in *Allen v. McCurry* leave the circuit courts free to adopt a conventional definition of collateral estoppel which gives no preclusive effect in a subsequent § 1983 action to a plea of guilty in an earlier state criminal prosecution?

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The respondent, John Franklin Prosise, respectfully opposes the petition of Gilbert A. Haring, Henry W. Allen, J.R. Badey, Alvin Beuchert, Thomas Trumble and Stanley Garber for a writ of certiorari to the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the district court is reported at 667 F.2d 1133 (1981), and is set forth in the appendix to the petition for writ of certiorari at pp. 7a-34a (here-

inafter App. at 7a-34a). The March 19, 1982 order of the circuit court denying a petition for rehearing and suggestion for rehearing *en banc* by an evenly divided court is unreported, but is set forth in the appendix (App. at 5a-6a). The April 17, 1979 order of the district court dismissing respondent's *pro se* complaint is unreported, but is set forth in the appendix (App. at 35a-45a).

JURISDICTION

The order of the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on April 17, 1979 in *John F. Prosise v. Lt. Gilbert A. Haring, et al.*, Civil Action No. 79-105-AM (App. at 35a-45a). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981 in *Prosise v. Haring, et al.*, Docket No. 79-6310 (App. 7a-34a). The petition for rehearing was denied by the panel of the circuit court, and the petition for rehearing and the suggestion for rehearing *en banc* was denied by an evenly divided court on March 19, 1981 (App. at 5a-6a). The petition for writ of certiorari was timely filed May 24, 1982, and was received by respondent on May 27, 1982. Petitioners invoke 28 U.S.C. § 1254(1) to seek review of the judgment of the Fourth Circuit Court of Appeals by way of a writ of certiorari to that court. The circuit court has stayed its mandate pending resolution of the case by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 provides in pertinent part:

> Such Acts, records and judicial proceeding [of a state] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In February, 1979, respondent filed a hand-written *pro se* complaint under 42 U.S.C. § 1983 alleging, *inter alia*, that when he was arrested on an unrelated charge

in September, 1977, the arresting officers illegally searched respondent's apartment and fraudulently altered the crime scene to create a plain view observation later used to obtain a search warrant for the apartment. Respondent sought money damages for the illegal search of his apartment and for the fraudulent alteration of the crime scene to manufacture probable cause to support the warrant authorizing the search of his apartment.

Among other things, petitioners moved for the § 1983 complaint to be dismissed raising as an affirmative defense the collateral estoppel effect of respondent's plea of guilty in state court to manufacturing a controlled substance based in substantial part upon evidence seized under authority of the alleged fraudulently obtained search warrant. The district court granted the motion to dismiss the complaint, holding, *inter alia*, that respondent was collaterally estopped by his plea of guilty in state court to litigate the lawfulness of the search of his apartment in federal court. In the alternative, the court ruled that respondent had waived the fourth amendment claim upon the reasoning of *Tollett v. Henderson*, 411 U.S. 258 (1973).

Respondent appealed this decision to the Fourth Circuit Court of Appeals arguing, *inter alia*, that state law governs the application of issue preclusion in an action under § 1983, and that Virginia has steadfastly refused to give preclusive effect in a civil action to a judgment rendered or to facts decided in a criminal prosecution. Moreover, respondent argued that the opinion of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980) leaves the circuit court free to adopt the conventional Virginia interpretation of issue preclusion which does not bar respondent's action raising fourth amendment claims which could have been but were not litigated in his state criminal prosecution. Finally, respondent argued that issue preclusion is a separate and distinct defense from claim preclusion, and that the former does not

include the element of waiver that claim preclusion contains, so that he is not barred by principles of either issue preclusion or waiver from litigating this claim.

A panel of the circuit court held that respondent's guilty plea neither waived nor barred this § 1983 action for damages based upon the allegedly illegal search of respondent's apartment. The judgment of the district court dismissing respondent's fourth amendment claim was reversed, and the matter was remanded to the trial court for further proceedings consistent with the circuit court's opinion.

A petition for rehearing with suggestion of rehearing *en banc* arguing that the panel decision overlooked facts and controlling law of the circuit, and pointing to an opinion of another panel of the court which petitioners argued was in conflict with the panel decision in this case, was denied by the panel and by the evenly divided court. Two stays of the mandate were entered by the circuit court, the final one staying the mandate of that court to and including May 28, 1982 to afford petitioners the opportunity to file in this Court a petition for writ of certiorari. A timely petition was filed, and this opposition to that petition follows.

The facts leading to respondent's arrest and which preceded the search at issue are largely not disputed and are set out in the Statement of the Case to the Petition for Certiorari (Petition, pp. 4-6) and in the opinion of the circuit court (App. at 8a-9a). The facts relating to what occurred in respondent's apartment after his arrest are in dispute and must be determined upon remand to the district court. The Court is respectfully directed to the opinion of the circuit court for a statement of what occurred as gleaned from petitioners' affidavit submitted in support of their motion for summary judgment in the district court. (App. at 9a-10a.)

REASONS FOR DISALLOWING THE WRIT

I. INTRODUCTION.

Review by writ of certiorari generally is reserved to resolve questions involving significant federal constitutional claims not capable of resolution on adequate state grounds, and which have resulted in a conflict among the circuits over the proper application or interpretation of a constitutional principle. It is not intended to afford disgruntled litigants an opportunity to have reviewed by this Court a decision of a court below with which they disagree.

Although petitioners have carefully framed their allegations so as to allege that the opinion below is in conflict with decisions of other circuits and is at odds with decisions of this Court, a careful review of the cases and the opinion below reveals that neither allegation is true. On the contrary, rather than being decided in a manner at odds with federal law and precedent, the opinion below is fully supported by the decision of this Court in *Allen v. McCurry* and has as its foundation an adequate state basis for the decision. Consequently, there exists no substantial federal question or conflict among the circuits which is ripe for resolution by this Court.

II. STATE LAW GOVERNS THE PRECLUSIVE EFFECT UPON § 1983 ACTIONS OF PRIOR STATE COURT JUDGMENTS, AND VIRGINIA GIVES NO PRECLUSIVE EFFECT IN CIVIL ACTIONS TO PRIOR CRIMINAL PROCEEDINGS.

In *Allen v. McCurry*, 449 U.S. 90 (1980) this Court reversed the decision of the Eighth Circuit Court of Appeals which held that a § 1983 plaintiff is free to litigate unencumbered by principles of res judicata fourth amendment issues which had been litigated and decided adversely to the § 1983 plaintiff in his state criminal trial. In so doing, the Court reserved for res-

olution by the circuit court "*how* the body of collateral estoppel doctrine or 28 U.S.C. § 1738 should apply in [the] case," *id.*, 449 U.S. at 105 n.25, noting only that in 28 U.S.C. § 1738:

> Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so.

Id., 449 U.S. at 96.

Recognizing this obligation, the opinion below looked first to the law ot Virginia "to determine whether, and to what extent, that state would give preclusive effect to the criminal judgment here at issue." *Prosise v. Haring*, 667 F.2d 1133, 1138 (4th Cir. 1981). Although expressing doubt as to the "exact operation of § 1738 and its relationship to general policies of *res judicata* in the § 1983 context," the court noted that "[i]t is generally assumed that the command is to give to the state judgment the same effect—no more and no less—that the state courts would give it." *Id.*, at 1138 n.4.

Whatever the precise nature of this relationship, the *Allen* Court made it clear that the circuit courts are free to apply the conventional doctrine of collateral estoppel as interpreted and applied by the various states. *Allen*, 449 U.S. at 95 n.7. Consequently, because the issue presented in this case can be resolved by resort to Virginia law, under authority of § 1738 this Court is bound by the state's application of collateral estoppel.

As noted in the opinion below, the general rule in Virginia is that:

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Prosise, 667 F.2d at 1139 *quoting Aetna Casualty & Surety Co. v. Czonka*, 200 Va. 385, 105 S.E.2d 869, 872 (1958). However, because the precise question involving the exclusion of evidence on fourth amendment grounds had never been decided by the state court, the opinion below declined to rest its decision exclusively on state grounds.

What the circuit court overlooked, though, is that even when collateral estoppel applies, the party asserting it has the burden of proving that the precise issue or fact he seeks to preclude was raised and determined in the first action, and that collateral estoppel bars litigation of the issue or fact in the subsequent civil action. *Clodfelter v. Commonwealth*, 218 Va. 98, 235 S.E.2d 340 (1977). Moreover, in Virginia collateral estoppel does not apply if it appears that the prior judgment could have been grounded on any facts or issues other than those sought to be precluded. *Lee v. Commonwealth*, 219 Va. 1108, 254 S.E.2d 126 (1979).

The opinion below therefore can be fully supported by resort to state law without resolution of the federal question advanced by petitioners in this Court. In sum, because Virginia gives no collateral estoppel effect whatsoever to criminal convictions in subsequent civil actions,[1] petitioners cannot sustain their burden of proving that respondent was estopped from litigating the fourth amendment claim in this case. Moreover, because the record reveals that respondent's guilty plea could have been supported by evidence independent of the search

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[1] A single limited exception to this general rule of non-preclusion has been recognized in Virginia in *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927) in which the civil plaintiff sought to recover under an insurance policy for the loss of goods he previously had been convicted of intentionally burning. Even in such cases, however, Virginia limited the exception to cases in which the party against whom estoppel is asserted "has once litigated the identical question and had it adversely decided in the criminal trial." *Id.*, 140 S.E.2d at 316.

at issue, Virginia law does not bar this issue from being litigated at this time.

There existing these independent state grounds for sustaining the opinion of the circuit court, there is no need for the Court to resolve the federal questions advanced by petitioners. The Court should refrain from reaching out to resolve questions not essential to the opinion below, and which therefore are not ripe for resolution. The command of Congress is that state law controls on such matters, and this Court should apply state law where it can readily be ascertained. Respondent respectfully urges the Court to decline the petitioners' invitation to ignore that command of 28 U.S.C. § 1738 for federal courts to apply state law.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER THE PROPER INTERPRETATION OF *ALLEN v. McCURRY* OR THE CORRECT APPLICATION OF THE CONVENTIONAL DOCTRINE OF COLLATERAL ESTOPPEL.

Not surprisingly, petitioners have pointed to no circuit court decisions which were decided after *Allen v. McCurry* which are contrary to the opinion below. Instead, petitioners claim a conflict with a decision of the Tenth Circuit which predates *Allen* by almost ten years, and which itself is at odds with the spirit if not the letter of *Allen*. Specifically, petitioners have pointed to *Metros v. United States District Court for the District of Colorado*, 441 F.2d 313 (10th Cir. 1971) in which the court held that a failure by the § 1983 plaintiff to litigate in state court the legality of the search which resulted in the seizure of all the evidence used to support his guilty plea barred him from raising the claim in the subsequent federal action.

As an initial matter, the *Metros* court did not have the benefit of *Allen* in which this Court noted that although some issues of law or fact regarding a criminal

defendant's arrest and trial might necessarily be decided by a conviction, other issues arising out of the arrest or trial are not necessarily decided by the conviction. *Allen*, 449 U.S. at 93 n.2. Moreover, *Allen* held that the availability of collateral estoppel as an affirmative defense would not prevent a § 1983 plaintiff from raising an issue he might have raised in his criminal trial but did not. *Id.*, n.5. Consequently, it is not at all clear that the Tenth Circuit would rule again as petitioners argue it did in *Metros* were the court to reconsider the question anew in light of *Allen*.

In sum, the question decided below has been considered by no circuit court other than the court below since this Court decided *Allen* and remanded that case to the circuit court to decide "*how* the body of collateral estoppel doctrine or 28 U.S.C. § 1738 should apply." For that reason, the circuits should be permitted the opportunity to fully develop the answers to that question, and to adequately frame the issues needing to be resolved by this Court before the question is accepted for review.

IV. THE DECISION BELOW DID NOT OVERLOOK THAT THE GUILTY PLEA MAY HAVE BEEN BASED UPON SEIZED EVIDENCE, BUT REJECTED SUCH FACTORS IN FAVOR OF A GENERAL RULE OF NON-PRECLUSION IN GUILTY PLEA CASES.

The petitioners argue that the circuit court "failed to consider the express finding by the state court that the search and seizure was the basis of the conviction." Petition for Writ of Certiorari at 15. Aside from the fact that this Court does not sit to correct arguably incorrect decisions below, the circuit court did not overlook this express finding by the state court but rather rejected such an analysis in favor of a "general rule of non-preclusion . . . in guilty plea cases." *Prosise*, 667 F.2d at 1142. Consequently, the circuit court did not overlook

the factual basis of respondent's guilty plea, but rejected the factual basis as a useful way of determining the preclusive effect to be given his plea.

In support of the argument that respondent waived his fourth amendment claim in this § 1983 action by pleading guilty in state court, petitioners have pointed to no case recognizing such a waiver principle. Instead, petitioners point repeatedly to cases holding that such issues are waived in subsequent habeas corpus actions seeking release from custody on the basis of previously unlitigated fourth amendment claims. Because there are no cases supporting petitioners' argument, no conflict exists among the circuits on a substantial federal question warranting resolution by this Court.

As support for the argument that respondent's guilty plea estoppes this § 1983 action, petitioners continually fail to discuss the erosion of the distinction between issue preclusion and claim preclusion which is engendered by their position. Instead, petitioners rely upon cases which in reality turn on questions of waiver, *see Palma v. Powers*, 295 F.Supp. 924 (N.D.Ill. 1969); *Hooper v. Guthrie*, 390 F.Supp. 1327 (W.D. Pa. 1975); and *Metros v. United States*, 441 F.2d 333 (10th Cir. 1972), although each case stated its holding in terms of estoppel. This Court should not perpetuate the erosion of the conventional doctrine of collateral estoppel as petitioners urge it to do. Moreover, the circuits should be left to consider the proper application of 28 U.S.C. §1738 and the principles of collateral estoppel to § 1983 cases as *Allen* directed them to do.

V. THE DECISION BELOW WILL NOT ENCOURAGE INCREASED LITIGATION UNDER 42 U.S.C. § 1983 BY STATE PRISONERS.

The petitioners also argue that the decision below will "encourage countless state prisoners to litigate claims of unlawful search and seizure and to challenge their state court convictions through § 1983 actions," as if that is

a sufficient basis for granting review in this case. Moreover, petitioners' argument ignores the fact that rather than create a new remedy or cause of action by its decision below, the circuit court merely analysed a traditional defense in the context of a well-established form of civil action.

In short, the right to sue under § 1983 for an illegal search has existed as long as the statute itself. For that reason, the decision below did not create a right of action where none previously existed. Consequently, one cannot assume that the circuit court's decision in this case will engender a new wave of civil litigation sufficient to prompt this Court to intervene at this early stage of the development of the issue by the various circuit courts.

CONCLUSION

By seeking to have this Court review a decision of the circuit court which conflicts with no decision of this Court or of any other circuit court, petitioners have lost sight of the reasons for allowing a writ of certiorari. Although it may be true as petitioners assert that "[t]here is nothing inherently unfair" in giving preclusive effect to a guilty plea, no decision of this or any other court has precluded the Fourth Circuit from adopting an interpretation of the conventional doctrine of collateral estoppel which refuses to give any preclusive effect to a guilty plea. On the contrary, this Court in *Allen* indicated that conventional principles of collateral estoppel are appropriate in § 1983 cases, and suggested that the circuit courts should consider the exact nature of the doctrine of collateral estoppel to be applied.

In short, this case presents neither a substantial federal question nor a significant conflict among the circuits on the precise issues presented by the case. As a consequence, no reason exists for the Court to allow the writ in this case. On the contrary, the Court should

permit the circuits to fully analyze and develop the precise nature of the relationship between 28 U.S.C. § 1738 and 42 U.S.C. § 1983 before answering the questions advanced by petitioners.

Respectfully submitted,

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